Dec 19 1874
Lyndle 1760 2
3-72

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~229.~~ 50

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE CHEMUNG CANAL BANK, PLAINTIFF IN ERROR,

vs.

GOODWIN LOWERY, IMPLEADED WITH DANIEL LOWERY AND PETER O. STRANG.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

R

FILED AUGUST 21, 1874.

Dec 21 1874

SUPREME COURT OF THE UNITED STATES.

No. 229.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE CHEMUNG CANAL BANK, PLAINTIFF IN ERROR,

vs.

GOODWIN LOWERY, IMPLEADED WITH DANIEL LOWERY AND PETER O. STRANG.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

INDEX.

	Original.	Print.
Writ of error	1	1
Præcipe	2	1
Bond for costs	3	2
Summons and return	4	3
Notice of retainer	6	4
Complaint	6	4
Demurrer	11	7
Judgment	12	8
Bond on writ of error	13	8
Citation	14	9
Certificate to transcript	15	9

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the western district of Wisconsin, greeting:

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which is in the said circuit court, before you, between the President, Directors, and Company of the Chemung Canal Bank, and Goodwin Lowery, impleaded with Daniel Lowery and Peter O. Strang, a manifest error has happened, to the great damage of the president, directors, and company of the Chemung Canal Bank, as by their complaint appears: We being willing that the error, if any hath been done, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, A. D. 1874, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, this 21st day of July, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] F. M. STEWART, *Clerk.*

FINCHES, LYNCH AND MILLER,
Milwaukee, Wis.

The return to within writ appears by the schedule hereto annexed.

The return of the circuit judge of the United States for the western district of Wisconsin.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in the city of Madison, this 7th day of August, A. D. 1874, and of our Independence the ninety-ninth year.

[SEAL.] F. M. STEWART, *Clerk.*

(Indorsed:) Supreme Court of the United States. The President, Directors, and Company of the Chemung Canal Bank vs. Goodwin Lowery, impleaded withDaniel Lowery and Peter O. Strang. Writ of error Filed July 21, 1874. F. M. Stewart, clk.

2 Circuit court of the United States of America for the western district of Wisconsin.

UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

At a special term of the circuit court of the United States of America for the western district of Wisconsin, begun and held according to law at the city of Madison, in said district, on the third Tuesday (being the 18th day) of February, A. D. 1873:

Present and presiding, the honorable James C. Hopkins, judge.

Among other the following proceedings were had, to wit:

THE PRESIDENT, DIRECTORS, AND COMPANY of the Chemung Canal Bank
vs.
GOODWIN LOWERY, PETER O. STRANG, AND Daniel Lowery. } At law.

Be it remembered that heretofore, to wit, on the 24th day of January, A. D. 1873, came the above-named plaintiffs, by their attorneys, Messrs. Finches, Lynch and Miller, and filed their præcipe for a summons on money-demand against the above-named defendants, as follows:

Præcipe.

THE PRESIDENT, DIRECTORS, AND COMPANY of the Chemung Canal Bank
vs.
GOODWIN LOWERY, PETER O. STRANG, AND Daniel Lowery.

The clerk will issue summons in above cause on money-demand
3 for $15,262.27, with interest from June 19, 1862.

FINCHES, LYNCH & MILLER,
Milwaukee.

To the CLERK.

Bond for costs.

Know all men by these presents that we, the President, Directors, and Company of the Chemung Canal Bank and Benjamin K. Miller, are held and firmly bound unto Goodwin Lowery, Peter O. Strang, and Daniel Lowery in the sum of two hundred dollars, to be paid to the said Goodwin Lowery, Peter O. Strang and Daniel Lowery, executors, administrators, or assigns; to which payment, well and truly to be made and done, we do bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals the 23 day of January, A. D. 1873.

Whereas an action is about to be commenced at the suit of the President, Directors, and Company of the Chemung Canal Bank against Goodwin Lowery, Peter O. Strang, and Daniel Lowery:

Now, therefore, the condition of this obligation is such, that if the plaintiff will pay all costs that may be awarded against him, not exceeding the aforesaid sum of , then this obligation to be void; else valid.

The President, Directors, & Company of the Chemung Canal Bank,
By FINCHES, LYNCH & MILLER, *Attys.* [SEAL.]
B. K. MILLER. [SEAL.]

WESTERN DISTRICT OF WISCONSIN, *ss:*
Milwaukee County, ss:

B. K. Miller, being duly sworn, says that he is worth the sum of two hundred dollars, exclusive of property exempt from execution and his debts.

4 B. K. MILLER.

Subscribed and sworn to before me this 23 day of January, A. D. 1873.

DAVID S. ORDWAY,
Notary Public, Mil. Co., Wis.

On the same day, to wit, on the 24th day of January, A. D. 1873, a writ of summons issued out of said clerk's office against said defendants in said-entitled cause, which said writ, together with the return of the marshal thereon, is in the words and figures following, to wit:

Summons.

The circuit court of the United States for the western district of Wisconsin.

THE PRESIDENT, DIRECTORS, AND COMPANY of the Chemung Canal Bank
vs.
GOODWIN LOWERY, PETER O. STRANG, AND Daniel Lowery.
} Summons for money-demand.

The United States of America to the above-named defendants:

You are hereby summoned and required to answer the complaint of the above-named plaintiffs in this action, which will be filed in the office of the clerk of this court at Madison, in said district; and you are also required to file your answer thereto with the clerk of this court, at Madison, and to serve a copy thereof on the attorneys of the plaintiffs, whose names are subscribed hereto, at their office in Milwaukee, Wisconsin, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the complaint as aforesaid, the plaintiff will take judgment against you for the sum of fifteen thousand two hundred and sixty-two dollars and twenty-seven cents, with interest thereon from the 19th day of June, in the year one thousand eight hundred and sixty-two, besides the costs of this action.

Witness the honorable Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, at the city of Madison, in the said western district of Wisconsin, this 24th day of January, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-seventh.

[L. S.] F. M. STEWART, *Clerk.*

FINCHES, LYNCH & MILLER,
Plffs.' Attorneys.

Served on the within-named Goodwin Lowery by leaving a copy of this summons at his usual place of abode, in presence of H. Lowery, a member of his family, of suitable age and discretion, whom I informed of the contents thereof, he not being found, this 30th day of January, A. D. 1873. Said Peter O. Strang and Daniel Lowery not found in my district.

F. W. OAKLEY,
Marshal,
By W. S. MAIN,
Deputy.

On this day, to wit, the 11th day of February, A. D. 1873, said defendant, Goodwin Lowery, by his attorneys, filed in said clerk's office his notice of retainer, and demand for copy of complaint in said-entitled cause, which said notice of retainer is in the words and figures following, to wit:

Circuit court of the United States for the western district of Wisconsin.

THE PRESIDENT, DIRECTORS, AND COMPANY OF the Chemung Canal Bank
v.
GOODWIN LOWERY, IMPLEADED WITH DANIEL Lowery et al.

6 GENTLEMEN: Take notice that we are retained and appear for the above-named defendant, Goodwin Lowery, and demand that a copy of the plaintiffs' complaint therein be served on us at our office, in the city of Madison, in said district. Dated Madison, Wis., Jany. 31st, A. D. 1873.

Yours, &c.,

GREGORY & PINNEY,
Attys. for Defendant, Goodwin Lowery.

To Messrs. FINCHES, LYNCH & MILLER,
Plffs.' Attys.

On this day, to wit, the 13th day of February, A. D. 1873, said plaintiffs, by their attorneys, filed in said clerk's office their complaint in said-entitled cause, which said complaint is in the words and figures following, to wit:

Complaint.

Circuit court of the United States for the western district of Wisconsin.

THE PRESIDENT, DIRECTORS, AND COMPANY of the Chemung Canal Bank
against
GOODWIN LOWERY, PETER O. STRANG, AND Daniel Lowery.

The complaint of the said plaintiff, by Finches, Lynch & Miller, its attorneys, alleges that heretofore, to wit, prior to the commencement of this suit, the said plaintiff was a corporation created under the laws of the State of New York, and still is such corporation, having its office and place of business in said State.

And said plaintiff alleges that the only defendant served with process and before this court is the defendant Goodwin Lowery, that each
7 and all of the other defendants named reside outside of the jurisdiction of this honorable court, and cannot be, and have not been, reached by the process of this honorable court; and said plaintiff alleges that at the time of the commencement of this suit said defendant Goodwin Lowery was, and still is, a citizen and resident of the State of Wisconsin.

And said plaintiff alleges that heretofore, to wit, on or about the 10

day of April, A. D. 1862, the said plaintiff commenced an action in the supreme court of the State of New York, in the county of Chemung, in said State, to recover from the said Goodwin Lowery and the other parties named the amount of a certain bill of exchange of which the following is a copy:

"$15,000.00.] ROCHESTER, N. Y., *December* 30, 1861.

"Ninety days after date, pay to the order of D. Lowery fifteen thousand dollars, value received, and charge to account of

"BRADNER AND CARROLL.

"To Messrs. LOWERY, STRANG & Co.,
"*No. 7 Beaver St., N. Y., Hemlock Lakes.*"

That afterwards said Goodwin Lowery, Peter O. Strang, and Daniel Lowery, under their firm-name of Lowery, Strang & Co., duly accepted said draft by writing across the face thereof an acceptance in these words:

"$15,000 accepted, payable at the Bank of North America.

"LOWERY, STRANG & CO."

And said plaintiff alleges that a copy of sum's and complaint in said action was duly and personally served upon said defendant Goodwin Lowery and others of said defendants on or about the 11th day of April, A. D. 1862, and that said defendant' Goodwin Lowery, Peter O. Strang, and Daniel Lowery duly entered, or caused to be entered,
8 their appearances in said action and answered said complaint; and said plaintiff alleges that afterwards such proceedings were had in the said cause upon the said issue, that on or about the 14th day of June, 1862, by the consideration and judgment of the said court, said plaintiff duly recovered a judgment against said Goodwin Lowery, Peter O. Strang, and Daniel Lowery, for fifteen thousand two hundred and nine dollars and fifty-two cents for its damages by reason of the non-payment of said bill of exchange, and further sum of thirty-eight dollars and eighteen cents for its costs and charges in that behalf expended, amounting in the whole to the sum of fifteen thousand two hundred and sixty-two dollars and twenty-seven cents; and said plaintiff alleges that the said court is a court of general jurisdiction, and had jurisdiction of the subject-matter and of the persons of said defendants.

And said plaintiff alleges that said judgment remains in full force and effect, not vacated, annulled, or set aside, and said defendants, and each of them, are justly indebted to said plaintiff therein in the said sum of fifteen thousand two hundred and sixty-two dollars and twenty-seven cents, with interest thereon from the said 11th day of April, 1862, at the rate of seven per centum per annum. And said plaintiffs allege that the said Goodwin Lowery did not come into the State of Wisconsin and was not a resident of said State of Wisconsin until the year 1864.

Wherefore said plaintiff demands judgment against said defendant for said sum of fifteen thousand two hundred and sixty dollars and twenty-seven cents, with interest thereon from said 11th day of April, 1862, at the rate of seven per cent. per annum, and the costs of this action.

FINCHES, LYNCH AND MILLER,
Attorneys for Plaintiff.

9 On this day, to wit, the 19th day of February, A. D. 1873, said defendant, by his attorneys, filed in said clerk's office his notice of motion in said-entitled cause, which said notice of motion is in the words and figures following, to wit:

Circuit court of the United States for the western district of Wisconsin.

THE PRESIDENT, DIRECTORS, AND COMPANY of the Chemung Canal Bank
against
GOODWIN LOWERY, IMPLEADED WITH DANIEL Lowery et al.

GENTS: Take notice that upon the complaint in this cause said court will be moved, on behalf of the defendant Goodwin Lowery, on the 24th day of February inst., at the United States court-room in the city of Madison, in said district, at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order striking out of said complaint the words & figures following, to wit, of which the following is a copy:

"$15,000.] ROCHESTER, N. Y., *Dec.* 30, 1861.

"Ninety days after date pay to the order of D. Lowery fifteen thousand dollars, value received, and charged to account of—

"BRADNER & CARROLL.

"To LOWERY, STRANG & Co.,
"*No. 7 Beaver St., N. Y., Hemlock Lakes.*

"That afterwards said Goodwin Lowery, Peter O. Strang, and Daniel Lowery, under their firm-name of Lowery, Strang & Co., duly accepted said draft by writing across the face thereof an acceptance in these words:

"$15,000 accepted, payable at the Bank of North America.
10 "LOWERY, STRANG & CO."

for the reasons following, to wit:

1st. The said matter is irrelevant and redundant.

2d. The insertion of said matter renders said complaint uncertain.

3d. For that the said complaint, with such matter included, embraces two distinct and independent demands or causes of action, and the same are not seperately stated, and that said complaint be made more definite and certain, or that such further or other order be granted in the premises as shall seem just and proper.

Yours, &c.,

GREGORY & PINNEY,
Attorneys for Deft. Goodwin Lowery.

On this day, to wit, on the 19th day of February, in the February special term, A. D. 1873, of said court, in the record of the proceedings thereof in said-entitled cause, before the honorable James C. Hopkins, judge, is the following entry, to wit;

THE PRESIDENT, DIRECTORS, AND COMPANY of the Chemung Canal Bank
vs.
GOODWIN LOWERY, PETER O. STRANG, AND Daniel Lowery.

This day came the defendant Goodwin Lowery, by his attorneys, and

moves the court that certain allegations in plaintiff's complaint be stricken out as irrelevant and redundant; and after being well advised of and concerning the same, it is ordered that said motion be and the same is hereby overruled.

11 On this day, to wit, the 21st day of February, A. D. 1873, said defendant Goodwin Lowery, by his attorneys, filed in said clerk's office his demurrer in said-entitled cause, which said demurrer is in the words and figures following, to wit:

Circuit court of the United States for the western district of Wisconsin.

THE PRESIDENT, DIRECTORS, & COMPANY OF the Chemung Canal Bank
vs.
GOODWIN LOWERY, IMPLEADED WITH DANIEL Lowery et al.

The defendant Goodwin Lowery demurs to the plaintiff's complaint in this action, for that it appears upon the face of the same that the plaintiffs' claim or demand is barred by the statute of limitations, in that it appears that supposed cause or causes of action did not, nor did either of them, accrue to the said plaintiff at any time within six years, nor at any time within ten years next before the commencement of this action, and for that the said complaint does not state facts sufficient to constitute a cause of action.

GREGORY & PINNEY,
Attys. for Deft. Goodwin Lowery.

We certify that, in our opinion, the foregoing demurrer is well founded in point of law.

GREGORY & PINNEY,
Attys. & of Counsel for Deft. Goodwin Lowery.

On this day, to wit, the 25th day of February, in the February special term, A. D. 1873, of said court, in the record and proceedings thereof in said-entitled cause, before the honorable James C. Hopkins,
12 judge, appears the following entry, to wit:

THE PRESIDENT, DIRECTORS, AND COMPANY of the Chemung Canal Bank
v.
GOODWIN LOWERY, IMPLEADED WITH DANIEL Lowery et al.

And now comes the parties, by their counsel, and the demurrer interposed by the defendant Goodwin Lowery to the plaintiffs' complaint being argued and submitted, is taken under advisement.

On this 11th day of March, in the February special term, A. D. 1873, of said court, in the record of the proceedings thereof in said-entitled cause, before the honorable James C. Hopkins, judge, appears the following entry, to wit:

Judgment.

THE PRESIDENT, DIRECTORS, AND COMPANY of the Chemung Canal Bank
v.
GOODWIN LOWERY, PETER O. STRANG, AND Daniel Lowery.

This day come the parties, by their counsel, and the demurrer of the defendant Goodwin Lowery to the plaintiffs' complaint, heretofore argued and submitted, is, after due consideration, sustained by the court, and the defendant is not bound further to answer the plaintiffs' complaint; whereupon it is considered and adjudged by the court, now here, that the said defendant Goodwin Lowery do have and recover of the said plaintiffs, the President, Directors, and Company of the Chemung Canal Bank, the sum of twenty-seven dollars, his costs about his said
13 suit expended, and that he have execution therefor.

On this day, to wit, the 21st day of July, A. D. 1874, said plaintiff, by its attorneys, filed in said court, in said-entitled cause, its security on writ of error, which said security is in the words and figures following, to wit:

Security on writ of error.

THE PRESIDENT, DIRECTORS, AND COMPANY of the Chemung Canal Bank, plaintiff in error,
vs.
GOODWIN LOWERY, IMPLEADED WITH DANIEL Lowery et al., defendant in error.

Know all men by these presents that we, Asahel Finch, William P. Lynch, and B. K. Miller, are held and firmly bound unto Goodman Lowery in the full and joint sum of five hundred dollars, to be paid to the said Goodman Lowery, his certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 20th day of July, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas, lately, at a term of the circuit court of the United States for the western district of Wisconsin, in a suit depending in said court between the President, Directors, and Company of the Chemung Canal Bank, plaintiff, and Goodwin Lowery, Peter O. Strang, and Daniel Lowery, defendants, judgment was rendered against the said plaintiffs, and the said plaintiffs having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the
14 judgment in the aforesaid suit, and a citation directed to the said Goodwin Lowery, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next ensuing:

Now, the condition of the above obligation is such that if the said The President, Directors, and Company of the Chemung Canal Bank shall prosecute its writ of error to effect, and answer all damages and

costs if they fail to made their plea good, then the above obligation to be void; else to remain in full force and virtue.

A. FINCH. [L. S.]
WM. P. LYNCH. [L. S.]
B. K. MILLER. [L. S.]

Sealed and delivered in presence of—
B. K. MILLER, JR.

Approved by—

J. C. HOPKINS, *Judge.*

And on the same day, to wit, the 21st day of July, A. D. 1874, came the above-named plaintiff, and filed his citation on writ of error, as follows:

Citation.

UNITED STATES OF AMERICA, *ss:*

To Goodwin Lowery, impleaded with Daniel Lowery and Peter O. Strang, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Wisconsin, wherein the President, Directors, and Company of the Chemung Canal Bank are plaintiffs, and you are defendant, in error, to
15 show cause, if any there be, why the judgment in the said writ of error mentioned shall not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable James C. Hopkins, judge of the district court of the United States for the western district of Wisconsin, this 21st day of July, in the year of our Lord one thousand eight hundred and seventy-four.

J. C. HOPKINS,
District Judge of the United States for the Western District of Wisconsin.

Certificate to transcript.

UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

I, F. M. Stewart, clerk of the circuit court of the United States for the western district of Wisconsin, do hereby certify that I have compared the above and foregoing with the original record and proceedings in said-entitled cause now remaining on file and of record in my office, in the city of Madison, in said district, and that the same is a true and correct transcript therefrom, and also a true copy of the bond on writ of error and citation.

In witness whereof I have hereunto set my hand and affixed the seal of the said circuit court of the United States for the western district of Wisconsin, at my office, in the city of Madison, this 15th day of August, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-ninth.

[SEAL.] F. M. STEWART, *Clerk.*

(Indorsement on cover:) No. 229. The President, Directors, & Company of the Chemung Canal Bank, plaintiffs in error, vs. Goodwin Lowrey, impleaded with Daniel Lowrey and Peter O. Strang. W. Wisconsin C. C. U. S. Filed 21st August, 1874.

Supreme Court of the United States.

No. ..... October Term, 1876.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE CHEMUNG CANAL BANK,
Plaintiff in Error,

vs.

GOODWIN LOWERY, impleaded with DANIEL LOWERY and PETER O. STRANG,
Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

WM. P. LYNDE,
Counsel for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1876.

THE PRESIDENT, DIRECTORS, and COMPANY OF THE CHEMUNG CANAL BANK,
Plaintiff in Error,

vs.

GOODWIN LOWERY, impleaded with DANIEL LOWERY and PETER O. STRANG,
Defendants in Error.

STATEMENT.

This suit was brought on the 30th of January, 1873, in the Circuit Court of the United States, for the Western District of Wisconsin, upon a judgment rendered in the Supreme Court of the State of New York, June 14th, 1862, for $15,200.27. The defendant Goodwin Lowery, who was the only defendant served with process, or who appeared in the court below, filed a demurrer to the complaint, as follows:

CIRCUIT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF WISCONSIN.

The President, Directors and Company of the Chemung Canal Bank,
vs,
Goodwin Lowery, impleaded with Daniel Lowery, et al.

The defendant Goodwin Lowery, demurs to the plaintiff's complaint in this action, for that it appears upon the face of the same, that the plaintiff's claim or demand is barred by the statute of limitations, in that it appears that supposed cause or causes of action did not, nor did either of them, accrue to the said plaintiff at any time within six years, nor at any time within ten years next before the commencement of this action; and for that the said complaint does not state facts sufficient to constitute a cause of action.

GREGORY & PINNEY,
Attys. for defendant, Goodwin Lowery.

Upon hearing, the court sustained the demurrer, and entered judgment against plaintiff for costs. (p. case, p. 8.)

The statute of the state upon which the demurrer is founded, will be found on page 822 of the Revised Statutes of 1858, and is as follows:

"SECTION 28. If, when the cause of action shall accrue against any person he shall be out of this state, such action may be commenced within the the terms herein respectively limited after the return

of such person into this state. *But the foregoing provisions shall not apply to any case where, at the time the cause of action shall accrue, neither the party against or in favor of whom the same shall accrue, are residents of this state;* and if, after a cause of action shall have accrued against any person, he shall depart from and reside out of this state, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action."

ASSIGNMENT OF ERRORS.

The court erred in sustaining the demurrer:

1st. Because the statute of limitations should have been specially pleaded, and the defendant could not, in a suit at law, avail him self of the statute by demurrer to bar the action.

2d. The Court erred in sustaining the demurrer, because the plaintiff might be within some of the various exceptions mentioned in the statute.

3d. The Court erred in sustaining the demurrer, because the statute provides that "if, when the cause of action shall accrue against any person, he shall be out of this State, such action may be commenced within the terms herein respectively limited, after the return of such person into this State," (which in this case is ten years,) and the subsequent clause which attempts to limit this right to parties who were citizens of the State at the time the cause of action ac-

crued, is in violation of the second section of the fourth article of the Constitution of the United States.

I.

The statute of Wisconsin requires that "the objection that the action was not commenced within the term limited, can only be taken by answer." (R. S. Wis., Ch. 138, § 1.) Wherever the common law pleadings prevail, the statute must be specially pleaded where the party seeks to avail himself of the statute as a bar to the remedy.

Bricket vs. Davis, 21 Pick. (Mass.) R., 404.
Gould vs. Johnson, 2 Lord Raymond R., 838.
Puckel vs. Moore, Ventris R., 191.
Jackson vs. Varick, 2 Wend. (N. Y.) R., 294,
Robins vs. Harvey, 5 Conn. R., 335.

Angel, (Ch. 26, Sec. 1) says: "It was first ruled, that as the statute prohibited actions from being brought beyond a certain period from the time when the cause of action accrued, it was taken as an absolute bar, and operated by its own force, and without pleading it. Afterwards the judges were equally divided in opinion on the question. But as the doctrine, when applied to a case merely because it appeared on the face of the declaration, that the action was com-

menced beyond the time prescribed by the statute, was seen to be clearly untenable, as the plaintiff might be within some of the various exceptions mentioned in the statute, it was overruled, and has so continued. That the statute must be pleaded, even when the cause of action appears on the face of the declaration, to be out of time, has been confirmed in a late case in England, where, on a promissory note, sixteen years old, and payable with interest, the plaintiff averred that the defendant did not pay the same and interest, or any part thereof, *except some interest within six years*, and the defendant pleaded the statute: it was held, on demurrer, a good bar, as the allegation of the payment of the interest introduced in the declaration, was premature, and that a payment is but evidence to show that, *prima facie*, there exists a cause of action.

"The statute being a strict defence, if the party omit to plead it, the court will not relieve him by permitting him to amend by adding the plea."

A different rule prevails in a court of equity, because of the difference in the jurisdiction of the court, and the case necessary to be made by the party to entitle himself to relief in a court of equity. Angel says: (Ch. 26, Sec. 10,) "It was formerly doubted whether a defendant in a Court of Equity, could, by demurrer, make the objection that the remedy was barred by the statute of limitations, or whether he must not first resort to his plea. *It is now, however, well settled, that, if it appears, on the*

face of the bill, that the suit is barred by the statute, and that if the case is within any exceptions of the statute, the fact must be stated in the complainant's bill. This has been so expressly held by Chancellor Walworth in Humbert vs. Trinity Church, (7 Paige, 195,) and in Van Hook vs. Whitlock, (7 Paige, 373,) and is so laid down by the latest and most authoritative writers on equity jurisprudence. If, therefore, upon the face of a bill, it appears that a debt accrued due more than six years before the commencement of the suit, a demurrer will lie."

The same rule prevails in this court, and several cases have been decided in this court upon demurrers to the bill of complaint, upon the ground that the statute of limitation had barred the right of action.

The bill in chancery not merely states the cause of action, but very properly anticipates the defence which may be made, and denies or avoids that. Not so with a declaration or complaint in a suit at law. The Supreme Court of the State of Wisconsin in Howell vs. Howell, 15th Wis., 55, has applied the rule which prevails in courts of equity to an equity case before them. It was a suit brought for a settlement and accounting of a co-partnership, and to establish an implied trust in land by reason of the partnership money invested by defendants in fraud of complainant's rights. But we know of no case, strictly a suit at law, where the Supreme Court of Wisconsin has decided that a party could avail himself of the statute of limitation by demurrer.

Judge Dewey, in delivering the opinion of the court, in Brickett vs. Davis, 25 Pick. R., 410, says: "The general principle seems, therefore, to be well established. It is founded upon the doctrine, that when there is a pre-existing cause of action, the statute does not extinguish it, but only takes away the remedy, and it is a right or privilege to be asserted by the defendant, requiring action on his part, and which action can only be effectual by his filing a plea to that effect, or what is equivalent, a notice of it as a special defence under the general issue, when that mode of pleading is authorized."

II.

The court erred in sustaining the demurrer, because the plaintiff might be within some of the various exceptions mentioned in the statute.

Angel on Limitations, chap. 26, sec. 1.
State vs. Finch, Cro. Car. 381.
Hawkins vs. Billhead, Cro. Car. 404.
Hyde vs. Van Valkenburgh, 1 Daly, 416.

III.

The court erred in sustaining the demurrer, because the statute provides that "if when the cause of action shall accrue against any person, he shall be out of this state, such action may be commenced

within the terms, (ten years in suits upon foreign judgments) herein respectively limited after the return of such person into this state."

This is the usual provision found in almost every statute of limitation in this country. The language varies in some of the statutes, but the saving provision, in some form, is contained in them all.

But it is claimed that this provision is limited in the Wisconsin statute, by the next clause, which is peculiar to this state, and can be found no where else, from James the 1st to the present time.

The clause reads as follows: "But the foregoing provision shall not apply to any case where, at the time the cause of action shall accrue, neither the party against or in favor of whom the same shall accrue, are residents of this state."

This clause means just this, that if A, a citizen of Pennsylvania, and B, a citizen of Wisconsin, had each sued Mr. Lowery, a citizen of New York, and had each obtained judgment at the same time in the courts of New York, and ten years after judgment Mr. Lowery moved to Wisconsin; that B, a citizen of Wisconsin, can any time within ten years thereafter, sue on his judgment in the courts of the state, but A, a citizen of Pennsylvania, cannot sue on his judgment, either in the State Court, or in the Courts of the United States. Here is a denial of the privileges and immunities enjoyed by the citizens of Wisconsin, to citizens of other states, in violation of the constitution of the United States.

This court has recognized the right of states to limit the time within which suits may be brought on foreign judgments, and sustained such statutes when the time was limited even to two years; but this court has not sustained any law which denied to citizens of other states the same rights to sue in the courts of the state enjoyed by citizens of the state.

We find no such statute in any other State. Wisconsin stands alone in its legislation against citizens of other states, in closing its courts against them. This provision, if valid, applies not merely to judgments, but to all causes of action which accrue out of the state.

Judge Washington, in *Corfield vs. Coryell*, 4 Washington C. C. R. 381, says: "The right of a citizen of one State to pass through, or to reside in any other State for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of *habeus corpus; to institute and maintain actions of any kind in the courts of the State;* to take, hold and dispose of property, either real or personal, and an exemption from higher taxes or impositions than are paid by the other citizens of the State, may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental. * * These, and many others which might be mentioned, are, strictly speaking, *privileges and immunities*, and the enjoyment of them by the citizens of each State, in every other

State, was manifestly calculated (to use the expressions of the preamble of the corresponding provision of the old articles of confederation) the better to secure and perpetuate mutual friendship and intercourse among the people of the different States of the Union."

Ward vs. Maryland, 12 Wall., 430.
Slaughter House Cases, 16 Wall., 117.
Cooley on Constitutional Limitations, p. 16, ib. 397.

Justice MILLER, in the opinion of the Court in the Slaughter House cases, 16 Wallace, 77, says of this clause of the constitution: "Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, *the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction.*" Justice FIELD, in his opinion in the same case, p. 98, says: "The privileges and immunities designated in the second section of the fourth article of the constitution are, then, according to the decisions cited, those which of right belong to the citizens of all free governments, and they can be enjoyed under that clause by the citizens of each State in the several States, upon the same terms and conditions as they are enjoyed by the citizens of the latter States. *No discrimination can be made by one State against the citizens of other States in their enjoyment, nor can any greater*

imposition be levied than such as is laid upon its own citizens. It is a clause which insures equality in the enjoyment of these rights between citizens of the several States whilst in the same State."

It is this discrimination against citizens of other states, in the right to maintain actions in the courts of Wisconsin, that we complain of in this case. If the plaintiff in this suit had been a citizen of Wisconsin at the time this cause of action accrued, although he had not remained a citizen a single day thereafter, there is no pretence his right of action would be barred under this statute; but because he was a citizen of another state at that time, he is barred from maintaining this action, even in the federal courts.

It will be claimed by the counsel for defendant that the plaintiff cannot set up that this provision of the statute is unconstitutional and void; that plaintiff is not a citizen within the meaning of that clause of the constitution which declares that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states, because plaintiff is a corporation organized under the laws of New York. It is not claimed that there is anything in this statute which expressly refers to foreign corporations, or that there is any mention made of corporations.

The right of foreign corporations to sue in the state of Wisconsin has never been denied. This court in Bank of Augusta vs. Earle, 13 Peters, 592,

say: "We think it is well settled, that by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts; and that the same law of comity prevails among the several sovereignties of this Union. The public and well-known, and long continued usages of trade, the general acquiescence of the states, the particular legislation of some of them, as well as the legislation of Congress, all concur in proving the truth of this position." This court has so frequently decided that a corporation has a right to sue in the courts of the United States, and is for the purposes of jurisdiction to be regarded as a citizen of the state under whose laws it is organized, that a reference to the cases is unnecessary. If a corporation can sue and be sued, can it be contended that a law which is unconstitutional and void can be enforced against and bar its rights? This court has said in Insurance Company vs. Morse, 20 Wall., 455, "A corporation has the same right to protection of the laws, as a natural person; and the same right to appeal to all the courts of the country. The rights of an individual are not superior, in this respect, to that of a corporation." If this limitation is void as to individuals, it is void in toto, and will not be enforced as against any party entitled to sue in the courts of the United States.

IV.

The last point to which I will call the attention of the court, is the effect of this unconstitutional clause

upon the rest of the section. The first part of the section provides "if, when the cause of action shall accrue against any person, he *shall be out of the State*, such action may be commenced within the terms herein respectively limited, after the return of such person into this State." This is the usual clause contained in statutes of limitation. It is in the statute of almost every State in the Union, and has been frequently adjudicated upon by the courts in this country and England; and it is very clear that the legislature intended that the citizens of Wisconsin should have the benefit of the provision. It was intended only to deprive the citizens of other states of the benefit of it, and for that purpose this provision was followed by the clause of which we complain. This court has said in *Bank of Hamilton vs. Dudley's Lessee* (2d Peters, 526): "If any part of the act be unconstitutional, the provisions of that part may be disregarded, while full effect will be given to such as are not repugnant to the constitution of the United States, or of the state or to the ordinance of 1787." Cooley, in his work on Constitutional Limitations, p. 178, says: "The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section, for the distributionin to sections is purely artificial, but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is

stricken out, that which remains is complete in itself, and capable of being executed, wholly independent of that which was rejected, it must be sustained."

In applying this rule to the statute before us, it is apparent that "when the unconstitutional portion of this section is stricken out, that which remains is complete in itself, and capable of being executed, wholly independent of that which was rejected," and leaves the law in harmony with the general legislation throughout this country and in England, and the adjudication of the courts.

WM. P. LYNDE,
Counsel for Plaintiff in Error.

Supreme Court of the United States

No. 229---October Term, 1875.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE CHEMUNG CANAL BANK,

Plaintiff in Error.

vs.

GOODWIN LOWERY, impleaded with DANIEL LOWERY AND PETER O STRANG,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

S. U. PINNEY,

Counsel for Defendant in Error.

Democrat Company, Printers, Madison, Wis.

Supreme Court of the United States,

OCTOBER TERM, 1875.

THE PRESIDENT, DIRECTORS and COMPANY OF THE CHEMUNG CANAL BANK,
Plaintiff in Error,

vs.

GOODWIN LOWERY, impleaded with DANIEL LOWERY and PETER O. STRANG,
Defendant in Error.

No. 229.

STATEMENT.

On the 30th day of January, 1873, the plaintiff in error sued the defendant in error on a judgment rendered in the Supreme Court of the state of New York, June 14, 1862, for $15,200.27, demanding judgment for that amount, and interest thereon from that date. The plaintiff was at the time of the rendition of this judgment, and ever since then had been a resident of New York. It was incapable, as a matter of law, of having any other residence. The defendant in error, Goodwin Lowery, *did not become a resident of Wisconsin until 1864.* Record, fol. 8 The cause of action on this judgment, therefore, accrued against him while he was out

of the state of Wisconsin; but when it accrued, neither the defendant against, or the party in favor of whom it accrued (the Bank) were residents of that state.

By the statute of Wisconsin, R. S., Ch. 138, § 16, Sub. 1, "an action upon a judgment or decree of any court of record of any state or territory within the United States, or of any court of the United States, is barred," unless commenced within ten years after the cause of action accrued. But by section 28 of the same chapter, it provided that "if when the cause of action shall accrue "against any person *he shall be out of this state*, such action may "be commenced within the terms herein respectively limited, *after* "*the return* of such person into this state. But the foregoing pro- "vision SHALL NOT apply to any case where, *at the time the cause* "*of action shall accrue*, neither the party against or in favor of "whom the same shall accrue, are residents of this state." By the allegations of the complaint, the cause of action relied on, was brought within the provisions of this last clause of section 28 above cited. Neither of the parties to this cause of action when it accrued were residents of Wisconsin. The plaintiff could not, as a matter of law, have been or be, a resident of Wisconsin, and the defendant, it is alleged, did not become a resident of the state until in 1864, and the cause of action accrued June 14, 1862, a period of more than ten years before January 30, 1873, when the action was commenced.

Such being the case made by the complaint, the defendant *Lowery* demurred to it, assigning as ground thereof, that the complaint did not state facts sufficient to constitute a cause of action, and that it appeared on the face of the complaint that the plaintiff's claim or demand was barred by the statute of limitations, in that it appeared the supposed cause or causes of action did not, nor did either of them accrue to the plaintiff at any time within six years, nor at any time within ten years next before the commencement of the action (Record, fol. 11.) And upon this demurrer the defendant had judgment.

I.

Where the defense of the statute of limitations is apparent on the face of the complaint, by the state practice, the objection that the demand is barred by the statute may be taken by demurrer, insisting, as was done in this case, on that specific ground. *Howell v. Howell*, 15 Wis., 55. "The objection that the action was not commenced within the time limited can only be taken by answer." (R. S. Wis., Ch. 138, § 1.) But in *Howell v. Howell*, *supra*, it was held that a demurrer assigning for cause that the claim or demand in question was barred by the statute of limitations, was an answer within the meaning of this section of the statute; adopting substantially the rule of equity pleading in this respect. And the practice in the state courts of Wisconsin was adopted for the United States courts sitting in Wisconsin, by 17 U. S. Stat., 197.

It is presumed that this proposition will not be disputed.

II.

The more material question is, whether the cause of action was barred by the statute of Wisconsin already cited.

The plaintiff seems to have brought the action upon the theory that sec. 28, R. S. Wis., Ch. 138, is not in effect materially different from sec. 24, Terr. Stat. of Wisconsin, page 261, providing that "if "at the time when any cause of action mentioned in this act shall "accrue against any person, he shall *be out of the territory*, the "action may be commenced within the time herein limited there-"for, *after* such person shall come into the territory." Under this statute it had been held, in *Brown v. Bicknell*, 1 Pinney, 226, that if when the cause of action accrued the defendant had not come into the territory, the cause of action would not be barred under the statute until the statutory period had elapsed after he had come into the territory, although it had accrued years before. To obviate the hardship and inconvenience of this ruling, in the next revision, (R. S. Wis., 1849, Ch. 137, Sec. 32), it was provided that "it shall be lawful for any person against whom

" any action shall be commenced in any court of this state, *where* " *the cause of action accrued without the state*, upon a contract or " agreement, express or implied, more than six years before the " commencement of the action, or upon any sealed or attested in- " strument in writing, or *judgment* or decree of any court more " than *ten* years before the commencement of the action, to plead " the same, and give the same in bar of the plaintiff's right of " action;" but the exception preventing the running of the statute where the defendant had not come into the territory, was not retained. It was repealed.

Thus stood the law, until the revision of 1858, R. S., Ch. 138, §§ 16 and 28; the period of limitation in cases like this remaining at ten years; but in that revision, section 28 above cited, was added restoring the exception as to persons out of the state, with the conditiod that this exception " shall not apply to any case where *at the* " *time the cause of action shall accrue*, neither the party against or " in favor of whom the same shall accrue are not residents of this state."

The plaintiff's complaint states its case to be within the last cited clause, neither of the parties being residents of Wisconsin when the cause of action on this judgment accrued.

I.

By the plain provisions of the statute of Wisconsin, the cause of action relied on was barred, and judgment was rightly given for the defendant on his demurrer.

Because it is well settled that the plea of the statute is a plea to the remedy, and the *lex fori* must prevail, and the courts of the United States sitting within the several states are bound by and must administer the statutory bar as prescribed by each state; and this is no impeachment of the doctrine that if a judgment is conclusive in a state where it is pronounced, it is equally so everywhere in the states of the Union.

" Prescription is a thing of policy, growing out of the experience of its necessity, and the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every na-

tion, in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction. This being the foundation of the right to pass statutes of prescription or limitation, may not our states, under our system, exercise their right *in virtue of their sovereignty?* or is it to be conceded to them in every other particular than that of barring the remedy upon judgments of other states by the lapse of time? The states use this right upon judgments rendered in their own courts, and the common law raises the presumption of the payment of a judgment after the lapse of twenty years. May they not, then, limit the time for remedies *upon the judgments of other states, and alter the common law by statute fixing a less or larger time* for such presumption, and altogether barring suits upon such judgments, if they shall not be brought within the time stated in the statute?"

"It certainly will not be contended that judgment creditors of other states shall be put upon a better footing, in regard to a state's right to legislate in this particular, than the judgment creditors of the state in which the judgment was obtained. And if this right so exists, may it not be exercised by a state's *restraining* the remedy upon the judgment of *another state*, leaving those of its own courts unaffected by a statute of limitations, but subject to the common law presumption of payment after the lapse of twenty years. In other words, may not the law of a state *fix different times* for barring the remedy in a suit upon a judgment of another state and for those of its own tribunals? * * * But the point might have been shortly dismissed with this sage declaration, that there *is no direct constitutional inhibition upon the states, nor any clause in the constitution from which it can be even plausibly inferred*, that the states may not legislate upon the remedy in suits upon the judgments of other states, exclusive of all interference with their merits. It being settled that the statute of limitations may bar recoveries upon foreign judgments; that the effect intended to be given under our constitution to judgments is, that they are conclusive only as regards the merits; *the common law principle then applies to suits upon them*, that they must be brought within the period

prescribed by the local law, the *lex fori*, or the suit will be barred." *McElmoyle v. Cohen*, 13 Peters, 324–329; *Bank v. Dalton*, 9 How. 526–529. "That acts of limitation furnish rules of decision, and are equally binding on the federal as they are on the state courts, is not open to controversy; the question presented is one of legislative power and not practice." *Bank* v. *Dalton, supra.*

2.

But it probably will be claimed that the provision of section 28: "But the foregoing provision shall not apply to any case where *at the time the cause of action shall accrue neither the party against or in favor of whom the same shall accrue, are residents of this state*," is in violation of Sec 2, Art. 4 of the constitution, which declares that "the citizens of each state shall be entitled to all "privileges and immunities of citizens in the several states," and therefore is void; that a discrimination is made by this statute of Wisconsin, against citizens of other states, depriving them of privileges and immunities secured to them by this provision of the federal constitution, inasmuch as the statute would commence to run as soon as the cause of action accrued, if *both parties* were not residents of the state, but would not if only one of them was not.

The general question made in this aspect of the case is, whether the statute in question does deprive citizens of other states of *privileges and immunities* secured to them by the constitution.

A conclusive answer to the proposition contended for, as applied to this case, consists in the fact that the corporation plaintiff, is not a *citizen* within the meaning of that word as used in the constitution, and therefore has no *status* or standing, such as to enable it to invoke the protection of this provision of the constitution. Corporations of other states are not within the protection thus guaranteed by this provision, and cannot be heard to complain of any infraction of it. *Warren Manf. Co. v. Etna Ins. Co.*, 2 Paine, C. C. 516; *Paul v. Virginia*, 8 Wall., 168. In the latter case it is laid down that the term citizen, as used in this provision "applies only to *natural* persons, members of the body politic, owing allegiance

to the state, not to artificial persons created by the legislatures, and possessing only the attributes which the legislature has prescribed," and it is said that "in no case which has come under our observation, either in the state or federal courts, has a corporation been considered a citizen within the meaning of that provision of the constitution which declares that the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states." A corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created, "the recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states, *a comity which is never extended* where the existence of the corporation or *the exercise of its powers* are prejudicial to their interests, *or repugnant to their policy*. *Bank of Augusta v. Earl*, 13 Peters, 586. As a matter of course they may close their courts against them, or may allow them to sue and maintain actions *within such period of time*, and under such restrictions as they see fit to impose.

A law requiring as a matter of state policy that actions brought in the courts of the state by foreign corporations shall be commenced within a certain period of time different and less than is prescribed in the case of domestic corporations or natural persons, would be valid as a limitation, and the federal courts sitting in the state would be bound to enforce it, although no state legislation could *close* the federal courts against such corporations, as it might the state courts.

The result, then, of the argument of the plaintiff in error is, to show merely that as to *natural* persons residents of other states when the cause of action accrues, the statute relied on is inoperative by reason of this constitutional provision, but that as to all cases such as the one before the court it may be operative, and no provision of the federal or state constitution is violated by enforcing it.

That an act may be valid and operative as to one class of persons or things and so be enforced, while as to another it may

be in conflict with the fundamental law, and so as to that class cannot be enforced, seems equally clear, whether considered as a matter of principle or authority. *People v. Green*, 58 N. Y., 295, 303.

3.

But the provision of the statute which limits the time for bringing actions upon judgments of any court of record of any state or territory of the United States to ten years, is an absolute and unconditional one. R. S. Wis, Ch. 138, § 16. The subsequent section 28 relates to exceptions applicable to *all causes* of action, accruing when the defendant is out of the state, is also a separate and independent provision modifying by the statutory rule of construction, that "if conflicting provisions be found in dif- "ferent sections of the same chapter, the provisions of the section "last in numerical order shall prevail, unless such construction be "inconsistent with the meaning of such chapter," (R. S. Wis., Ch. 191, § 12), the generality of the provisions of section 16.

Now it is not enough for the plaintiff to show that one clause of section 28 is void. This would not remove the bar, and for the obvious reason that it is manifest that the legislature did not intend that there should be any exception to the general provisions of section 16, *unless the condition attached to such exception can be operative as a part of it and be enforced with it.* In other words, the provision sought to be impeached, declaring that the exception as to those out of the State should not "apply to any "case where, at the time the cause of action shall accrue, neither "the party against or in favor of whom the same shall accrue are "residents of this State" is a condition to or consideration for the exception, and if the provision so standing as a consideration for it cannot be enforced, then the exception must fail. *Warren v. Charlestown*, 2 Gray, 84; *Slauson v. Racine*, 13 Wis., 398. When the void parts of a statute are evidently designed as a compensation for, or inducements to the valid portion thereof, so that the whole taken together warrant the belief that the legislature would not have passed the valid portions alone, then the

whole will be held inoperative. *State ex rel. Walsh v. Dousman*, 28 Wis., 547.

In considering this question it is important to bear in mind that by the revision of 1849, no exception was made as to persons out of the state, the provision in the territorial statute in that respect not having been retained, and the further fact that prior to the revision of 1858 (now in force) the limitation in a case of this kind was ten years. So much of the legislation as introduced the exception as found in Sec. 28, Ch. 138, with the condition annexed upon which we insist, is new, and it is plain that the former law should stand and be held in force, *unless the exception and the condition attached to it can both be enforced.*

If, then, section 28 entirely fails, as it is submitted it must, if the condition to the exception cannot be enforced, then the bar of ten years is absolute, and the result would be that the plaintiff's cause of action was barred, and so the judgment of the court below is correct.

4.

But the question still remains whether Sec. 28 of Ch. 138, R. S., Wis., infringes that section of the constitution which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states."

And as applied to this statute, is it an infringement of this provision of the constitution that a different rule, and less favorable to the plaintiff, as to the limitation of actions, is prescribed in cases where both parties reside out of the state when the cause of action accrues, than where only one of them resides in it? And it is proper to notice that it matters not which of them resides in the state, when the cause of action accrues, whether plaintiff or defendant, that fact renders the provisions of section 28 on which we rely inapplicable, and the action may be brought at any time within ten years after the defendant shall come into the state. So that in fact there can be no discrimination between cases, except such as is based on the question of the *residence of the defendant* when the cause of action accrues. If he resides out of the state when

be in conflict with the fundamental law, and so as to that class cannot be enforced, seems equally clear, whether considered as a matter of principle or authority. *People v. Green*, 58 N. Y., 295, 303.

3.

But the provision of the statute which limits the time for bringing actions upon judgments of any court of record of any state or territory of the United States to ten years, is an absolute and unconditional one. R. S. Wis, Ch. 138, § 16. The subsequent section 28 relates to exceptions applicable to *all causes* of action, accruing when the defendant is out of the state, is also a separate and independent provision modifying by the statutory rule of construction, that "if conflicting provisions be found in dif- "ferent sections of the same chapter, the provisions of the section "last in numerical order shall prevail, unless such construction be "inconsistent with the meaning of such chapter," (R. S. Wis., Ch. 191, § 12), the generality of the provisions of section 16.

Now it is not enough for the plaintiff to show that one clause of section 28 is void. This would not remove the bar, and for the obvious reason that it is manifest that the legislature did not intend that there should be any exception to the general provisions of section 16, *unless the condition attached to such exception can be operative as a part of it and be enforced with it.* In other words, the provision sought to be impeached, declaring that the exception as to those out of the State should not "apply to any "case where, at the time the cause of action shall accrue, neither "the party against or in favor of whom the same shall accrue are "residents of this State" is a condition to or consideration for the exception, and if the provision so standing as a consideration for it cannot be enforced, then the exception must fail. *Warren v. Charlestown*, 2 Gray, 84; *Slauson v. Racine*, 13 Wis., 398. When the void parts of a statute are evidently designed as a compensation for, or inducements to the valid portion thereof, so that the whole taken together warrant the belief that the legislature would not have passed the valid portions alone, then the

whole will be held inoperative. *State ex rel. Walsh v. Dousman*, 28 Wis., 547.

In considering this question it is important to bear in mind that by the revision of 1849, no exception was made as to persons out of the state, the provision in the territorial statute in that respect not having been retained, and the further fact that prior to the revision of 1858 (now in force) the limitation in a case of this kind was ten years. So much of the legislation as introduced the exception as found in Sec. 28, Ch. 138, with the condition annexed upon which we insist, is new, and it is plain that the former law should stand and be held in force, *unless the exception and the condition attached to it can both be enforced.* Slinger v Kunneman 38

If, then, section 28 entirely fails, as it is submitted it must, if the condition to the exception cannot be enforced, then the bar of ten years is absolute, and the result would be that the plaintiff's cause of action was barred, and so the judgment of the court below is correct.

4.

But the question still remains whether Sec. 28 of Ch. 138, R. S., Wis., infringes that section of the constitution which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states."

And as applied to this statute, is it an infringement of this provision of the constitution that a different rule, and less favorable to the plaintiff, as to the limitation of actions, is prescribed in cases where both parties reside out of the state when the cause of action accrues, than where only one of them resides in it? And it is proper to notice that it matters not which of them resides in the state, when the cause of action accrues, whether plaintiff or defendant, that fact renders the provisions of section 28 on which we rely inapplicable, and the action may be brought at any time within ten years after the defendant shall come into the state. So that in fact there can be no discrimination between cases, except such as is based on the question of the *residence of the defendant* when the cause of action accrues. If he resides out of the state when

it accrues, and the plaintiff within the state, then the statute does not begin to run until he comes into it. If he resides within the state, then it is immaterial whether the plaintiff resides in it or out of it, the statute begins to run when the cause of action accrues, and the statute provides that the same result shall follow where *both parties resided out of the state when the cause of action accrued*, whereas, if the plaintiff resided in it, the statute would not begin to run until the defendant should come into the state. Under this statute it is immaterial where the parties reside *when the suit is brought*. The rule is the same whether they are *then* residents or non-residents. The material point is whether they were *both* residents *when the cause of action accrued*, and is founded upon a conviction that a different policy should prevail as to such cases, than where one of the parties resided in the state; both in such case standing on an equal footing as to facilities for resorting to the courts of this state.

In *McElmoyle v. Cohen*, 13 Peters, 327, speaking of the plea of the statute, the court say: "Is it a plea that settles the right of a party on a contract or judgment, or one that bars the remedy? Whatever diversity of opinion there may be among jurists upon this point, we think it well settled to be *a plea to the remedy*, and consequently that the *lex fori* must prevail." Each state, by virtue of its sovereignty and absolute control over the matter of regulating remedies within its limits in this regard may pass such laws as it may deem wise and prudent, *so long as a substantial remedy is not denied.*

As said in *McElmoyle v. Cohen*, "Prescription is a thing of policy, growing out of the experience of its necessity, and the time after which suits or actions shall be barred, has been, from remote antiquity, fixed by every nation, in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction."

It is respectfully insisted that a regulation of the remedy or the right to maintain actions (not a denial of a remedy), founded upon considerations of public policy, such as this statute is, is not a vio-

lation of any of those "privileges and immunities which are in their nature *fundamental*; which belong, of right, to the citizens of all free governments; and which have at all times been enjoyed by the citizens of the several states which compose the Union, from the time of their becoming free, independent and sovereign." *Corfield v. Coryell*, 4 Wash., C. C., 38. The constitutional provision extends only to such privileges and immunities as these, and the claim that no other or different rule as to the limitation of actions which accrued when both parties were not residents of the state *when the cause of action accrued*, than between parties one or both of whom were residents, is the assertion of a privilege or immunity not within the category thus laid down, and therefore not secured by this constitutional provision.

These fundamental principles, thus secured, it is said per WASHINGTON, J., in *Corfield v. Coryell*, 4 Wash., C. C., 381, may "be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for the purposes of trade, agriculture, professional pursuits or otherwise; to claim the benefit of the writ of *habeas corpus;* to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state, may be mentioned as some of the particular privileges and immunities of citizens, which are embraced by the general description of privileges deemed to be fundamental; to which may be added the elective franchise as regulated and established by the laws or constitution of the state in which it is to be exercised. * * * But we cannot concede the proposition which was insisted on by the counsel, that under this provision of the constitution, the citizens of the several states are permitted to participate in all *the*

rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens."

Subsequently this court, in *Conner v. Elliott*, 18 How., 591, 594, while declining to describe and define the privileges and immunities secured by this provision of the constitution, said that "if a law of Louisiana were to give to partners *inter sese* certain peculiar rights, provided they should reside within the state, and carry on the partnership trade there, we think it could not be maintained that all co-partners, citizens of the United States, residing and doing business elsewhere, must have these peculiar rights by force of the constitution of the United States, any more than it would be maintained that because a law of Louisiana gives certain damages on protested bills of exchange, drawn or indorsed within that state, the same damages must be recovered on bills drawn elsewhere, in favor of citizens of the United States." This provision does not extend to securing "to citizens of each state in *other* states, the peculiar privileges conferred by their laws," as that would give "an extra territorial operation to local legislation, utterly destructive of the independence and harmony of the states." *Paul v. Virginia*, 8 Wall., 181; *Ward* v. *Maryland*, 19 id., 430; *Slaughter-House* Cases, 16 id., 76.

It is competent, then, it is submitted, for the legislature of Wisconsin, in dealing with the subject of prescription, to provide that as between parties not resident of the state, so far as resort to its courts is concerned, the statute of limitations shall begin to run when the cause of action accrues, and that as to cases where either or both are residents, it shall commence to run only when the defendant comes into the state, and that this is a legitimate regulation of the remedies which the state may provide by its laws, and not a denial or abridgment of the privileges or immunities of citizens of other states secured by this provision of the constitution. Many similar laws have existed on the statute books of the states since the earliest period in our history, as for instance, laws requiring non-residents to give security for costs as a condition of suing

in the courts of the state and laws subjecting the property of non-residents to attachment, *merely because they are non-residents;* no such process being allowed against residents except for some well defined cause not involving the question of residence.

These and all similar statutes, including the limiting the time for the commencement of actions in its courts, a state *by virtue of its sovereignty as such*, may constitutionally pass, according to its own notions of *state policy*, as they are in no just sense violations of the privileges and immunities secured to citizens of other states by the provision of the constitution in question.

As applied to this case, the statute declares that inasmuch as the cause of action accrued, and the statute of New York began to run on it, while both parties resided there, the statute of Wisconsin in like manner began to run on it at the same time, so far as any action founded on it in the courts of the latter state are concerned. It is difficult to understand how any injustice is to be done by enforcing a provision which sets the Wisconsin statute running on the claim at the same time the statute of the state wherein *both parties reside*, begins to run on it, even though the limitation of the Wisconsin act is much the shorter one, as it may lawfully be. Both parties being then, resident of the same jurisdiction, reason and sound policy require that the limitation of their right to litigate any particular matter, should begin to run, as to the courts of Wisconsin, when the cause of action accrues, equally as though they both resided here. The application of the other rule contended for would allow parties resident of the same jurisdiction to forbear suit, until the period fixed by the policy of that state to end strife had nearly elapsed, and if the defendant should come into Wisconsin, another period, equally as long might elapse before the courts of the latter state would be closed against a stale claim, and in the mean time the means of resisting it, if an unjust one may have been lost or destroyed.

For these reasons we submit that the act is a wise one in point of sound state policy, entirely competent for the state to pass, that it is not in violation of the federal constitution, and that whether so

or not the plaintiff is not a citizen within the sense of this constitutional provision or entitled to invoke its protection, and that whether the particular provision of section 28, on which we rely is void or not, the plaintiff's right of action was barred.

S. U. PINNEY,

Counsel for Defendant in Error.

Dec Stat 122 sec 8
dwelling
dwelling 125 sec
15 Missouri 55
17 Wall 168
34 Wis 5pl
28 Ore. 21
Cooley 179-180 *
38 Wis 504